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No. 04-885

IN THE

Supreme Court of the United States

CENTRAL VIRGINIA COMMUNITY COLLEGE, *et al.*,
Petitioners,

v.

BERNARD KATZ,
Liquidating Supervisor for Wallace's Bookstores, Inc.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the Bankruptcy Clause of Article I grants Congress the power to abrogate the States' sovereign immunity from suits for money damages.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county and municipal governments and officials throughout the United States.[1] *Amici* have a compelling interest in protecting state sovereignty from federal judicial encroachments.

The Eleventh Amendment is one of the principal constitutional protections of state sovereignty. The Amendment recognizes that "each State is a sovereign entity in our federal system" and that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996) (quotations and citations omitted). The Court has repeatedly held that "Congress may not . . . base its abrogation of the States' Eleventh Amendment immunity upon the powers enumerated in Article I." *See, e.g., Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 364 (2001).

The court of appeals blatantly disregarded settled authority in holding that Congress could validly abrogate the States' Eleventh Amendment immunity under its Article I Bankruptcy Clause powers and subject States to damages actions such as those brought here, which seek to avoid and recover alleged preferential transfers. Contrary to the understanding of the court of appeals, the framers no more contemplated that the need for federal uniformity in bankruptcy law justifies overriding the States' sovereign immunity than does the need for uniformity under the Commerce Clause or any other Article I power. Because "'Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction'" with respect to the States, *id.* (quoting *Seminole*

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[1] The parties have consented to the filing of this *amicus* brief and their letters of consent have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than *amici* or their members made a monetary contribution toward its preparation or submission.

Tribe, 517 U.S. at 73), *amici* submit this brief to assist the Court in its resolution of this case.

SUMMARY OF ARGUMENT

1. Adversary proceedings against States in federal bankruptcy court that seek money damages violate the core purposes of Eleventh Amendment immunity. First, by subjecting States to suit at the instance of private parties, such suits deny the States the dignity and respect they are entitled to as co-sovereigns in the federal system. Indeed, these suits are an especially severe affront to the dignity of the States because a State can be summoned to defend itself in federal bankruptcy courts in numerous locations.

In contrast to federal district court litigation, nationwide service of process is available in bankruptcy proceedings. Moreover, "a defendant in an adversary proceeding . . . is subject to personal jurisdiction in a distant forum even if that defendant does not have 'minimum contacts' with that forum." Charles Jordan Tabb, *The Law of Bankruptcy* § 4.9, at 255 (1997). Furthermore, under bankruptcy's venue rules, a corporation can file its petition where either its "principal place of business" or "principal assets" are located. 28 U.S.C. § 1408(1). A corporation can also file in any district where one of its affiliates has a petition pending under Title 11. *Id.* § 1408(2). Thus, a State could be summoned to defend itself in an adversary proceeding occurring in a federal bankruptcy court thousands of miles away from the State.

State sovereign immunity also serves the critical function of protecting the States' fiscal integrity. Adversary proceedings pose a substantial threat to the States' fiscal integrity because of the large number and variety of contracts that States enter into in the course of administering government programs. Moreover, adversary proceedings could also be used to avoid and recover state tax payments. Given the large number of bankruptcy filings, a holding that the States' sovereign immunity does not bar adversary proceedings that seek money damages would expose the States to substantial and unpredictable liabilities and violate core Eleventh Amendment principles protecting a State's control over its treasury.

2. The four adversary proceedings at issue here are classic *in personam* actions which seek money damages and are barred by the Eleventh Amendment. In contrast to *Hood*, the trustee does not seek "a determination of the dischargeability of [a] debt," but rather "to recover property in the hands of the State on the grounds that the transfer was a voidable preference." *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 453-54 (2004). Each of the suits seeks to recover money damages from Virginia on the grounds that the state defendants received preferential transfers. These cases do not implicate a bankruptcy court's *in rem* jurisdiction as there is "no *res* to which the court's *in rem* jurisdiction could have attached." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 38 (1992). Moreover, the Court has "never applied an *in rem* exception to the sovereign-immunity bar against monetary recovery." *Id.*

3. Notwithstanding this Court's holding in *Seminole Tribe* that Congress cannot abrogate the States' sovereign immunity under its Article I powers, the Sixth Circuit held in *Hood* that "the text of the Constitution and other evidence of the framers' intent demonstrate that under the Bankruptcy Clause . . . Congress has the power to abrogate state sovereign immunity." *Hood v. Tennessee Student Assistance Corp.*, 319 F.3d 755, 762 (6th Cir. 2003), *aff'd on other grounds*, 541 U.S. 440 (2004). While acknowledging that "[m]uch of the evidence regarding the plan of the Convention is ambiguous," 319 F.3d at 767, the Sixth Circuit reasoned that the "the power to make 'uniform' laws" and the framers' understanding of the bankruptcy clause demonstrate that the States surrendered their immunity from suit in bankruptcy. *Id.* at 762-68.

The framers, however, gave the subject of bankruptcy "only passing attention." Tabb, *The Law of Bankruptcy* § 1.6, at 32. Just one delegate to the convention voted against the clause and he did so because he believed that it would permit the punishment of bankruptcy by death. This is not the type of debate that would have ensued had the framers intended that the States grant Congress the power to abrogate their sovereign immunity under the clause.

The Bankruptcy Clause's text likewise does not provide probative, let alone compelling, evidence that the States surrendered their sovereign immunity with respect to bankruptcy proceedings. Indeed, the Court has recognized that the clause's uniformity requirement is a limitation on Congress' power to enact bankruptcy laws. *See Railway Labor Executives Ass'n v. Gibbons*, 455 U.S. 457, 468-69 (1982). It would be strange to read language that imposes limits on congressional power as also manifesting a surrender by the States of their sovereign immunity. Moreover, this Court has never held that the framers' grant to the federal government of authority over a substantive area because of the need for uniform rules is sufficient to establish that the States surrendered their immunity from private party suits in that area.

Historical practice supports the conclusion that Congress lacks power under the Bankruptcy Clause to subject States to suits for money damages. For nearly two hundred years following the ratification of the Constitution and a century and a half after federal bankruptcy law first recognized the voidable preferential transfer, Congress did not subject States to such suits. This longstanding view of its own powers is persuasive evidence that the Bankruptcy Clause does not grant Congress authority to abrogate the States' sovereign immunity. The judgment of the court of appeals should therefore be reversed.

ARGUMENT

STATES ARE IMMUNE FROM ADVERSARY PROCEEDINGS IN FEDERAL BANKRUPTCY COURT THAT SEEK MONETARY DAMAGES OR OTHER AFFIRMATIVE RELIEF

The court of appeals deemed itself bound by its earlier panel decision in *Hood v. Tennessee Student Assistance Corp.*, 319 F.3d 755 (6th Cir. 2003), *aff'd on other grounds*, 541 U.S. 440 (2004). *See* Pet. App. 2a. In that case, the Sixth Circuit held that the States surrendered their immunity from private suits in bankruptcy in the Constitutional Convention, and therefore the Bankruptcy Clause granted Congress the necessary authority to abrogate state sovereign immunity in 11 U.S.C. § 106(a). *See* 319 F.3d at 762-68; *see also* 541 U.S. at 445 (summarizing Sixth Circuit's holding). In *Hood*, this Court did not reach the question, holding "that a bankruptcy court's discharge of a student loan debt does not implicate a State's Eleventh Amendment immunity." *See* 541 U.S. at 445.

The question presented here—whether an adversary proceeding against a State that either seeks a payment on account or to avoid and recover a preferential transfer—does, by contrast, clearly implicate the Eleventh Amendment. Indeed, because the whole purpose of respondent's suits is to recover money from a State, it is a paradigmatic example of suits which this Court has held are prohibited by both the Eleventh Amendment and the structural principle of sovereign immunity. *See Alden v. Maine*, 527 U.S. 706, 750-54 (1999); *Edelman v. Jordan*, 415 U.S. 651, 678 (1974).

Contrary to the court of appeals' reasoning in *Hood*, there is no evidence that supports the notion that the States surrendered their sovereign immunity from suits for money damages in the context of bankruptcy proceedings. The rationale that such a surrender can be inferred from the

Bankruptcy Clause's grant to Congress of the power to make "uniform laws" on the subject is unsustainable. In contrast to the situation in *Hood*, which did not require a payment out of the state treasury, the framers did not intend that state treasuries be subjected to adversary proceedings whose purpose is, as here, to increase the assets of the bankruptcy estate and pay off the claims of private creditors. Indeed, protecting the States from the claims of private creditors was the very impetus behind the ratification of the Eleventh Amendment. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406 (1821). It is equally untenable to suggest that the States can be sued to recover damages that will be used to pay private parties who are not even the State's creditors but rather the creditors of the bankrupt debtor. The judgment of the court of appeals should therefore be reversed.

I. AN ADVERSARY PROCEEDING AGAINST A STATE WHICH SEEKS MONEY DAMAGES IS PROHIBITED BY THE STATE'S SOVEREIGN IMMUNITY

A. An Adversary Proceeding Against A State Violates The Core Purposes of Eleventh Amendment Immunity

The Constitution specifically recognizes that the States are "sovereign entities," that exercise "a substantial portion of the Nation's primary sovereignty" and possess "the dignity and essential attributes inhering in that status." *Alden*, 527 U.S. at 713-14. Moreover, "even as to matters within the competence of the National Government, the constitutional design secures the founding generation's rejection of 'the concept of a central government that would act upon and through the States' in favor of 'a system in which the State and Federal Governments would exercise concurrent authority over the people.'" *Id.* at 714 (citation omitted). This system of "[d]ual sovereignty is a defining feature of our Nation's constitutional blueprint." *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 751 (2002).

The States' "immunity from private suits," *id.* at 752, is "[a]n integral component of [their] 'residuary and inviolable sovereignty.'" *Id.* at 751 (quoting James Madison, The Federalist No. 39, at 245 (C. Rossiter ed. 1961)). The immunity "is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments." *Alden*, 527 U.S. at 713.[2] While the Court has recognized that the "States, in ratifying the Constitution, did surrender a portion of their inherent immunity by consenting to suits brought by sister States or by the Federal Government," it has repeatedly held that "the Convention did not disturb States' immunity from private suits." *Federal Maritime Comm'n*, 535 U.S. at 752.

The States' sovereign immunity from suits brought by private parties serves two principal functions. First, "the doctrine's central purpose is to 'accord the States the respect owed them as' joint sovereigns." *Id.* at 765 (quoting *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)). "'The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the

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[2] As Alexander Hamilton wrote:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States . . . .

The Federalist No. 81, at 487 (C. Rossiter ed. 1961) (quoted in *Alden*, 527 U.S. at 716-17).

instance of private parties.'" *Puerto Rico Aqueduct*, 506 U.S. at 146 (quoting *In re Ayers*, 123 U.S. 443, 505 (1887)). *See also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997) (The States' sovereign immunity "is designed to protect" the "dignity and respect" owed the States as members of the Union.).

This fundamental principle of federalism is violated whether a suit is initiated in a federal court, *see Seminole Tribe*, 517 U.S. at 72-73, a state court, *see Alden*, 527 U.S. at 748-54, or an Article II administrative tribunal. *See Federal Maritime Comm'n*, 535 U.S. at 760. It is likewise offended when a State is summoned to defend itself before an Article I court such as a federal bankruptcy court. "Private suits against nonconsenting States . . . present 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties,' regardless of the forum." *Alden*, 527 U.S. at 749 (quoting *In re Ayers*, 123 U.S. at 505).

Adversary proceedings in federal bankruptcy court are an especially severe affront to the dignity and respect which a State is owed as a sovereign. In most cases implicating the Eleventh Amendment, at least the State is sued in a federal district court that is located within the State. In contrast, "nationwide service of process is available in proceedings within bankruptcy subject matter jurisdiction." Charles Jordan Tabb, *The Law of Bankruptcy* § 4.9, at 255 (1997).

"[A] defendant in an adversary proceeding in bankruptcy is subject to personal jurisdiction in a distant forum even if that defendant does not have 'minimum contacts' with that forum." *Id.* Thus, "the defendant only needs to have minimum contacts within the United States as a whole," *id.*, which every State obviously does. *See, e.g.*, J.A. 3 (Complaint against Central Va. Comm. College ¶ 6) ("Upon information and belief, Defendant is a resident of the United States."); *see also id.* at 10 (Complaint against VMI ¶ 6) (same).

Moreover, bankruptcy employs liberal venue rules. For example, a corporation can file in the district in which either its "principal place of business" or "principal assets" are located. 28 U.S.C. § 1408(1). Furthermore, "a corporation may file in any district in which there is pending a case under title 11 concerning an *affiliate* of the corporation." Tabb, *The Law of Bankruptcy* § 4.10, at 257 (citing 28 U.S.C. § 1408(2)). Because the definition of an "affiliate" encompasses "virtually any other corporation in a corporate group, be it a parent, subsidiary, or sister corporation," the "members of a corporate group [have] considerable venue choice." *Id.*

Thus, under the bankruptcy rules, a State could be summoned to defend itself in an adversary proceeding in a federal bankruptcy court thousands of miles away. While in this case, Virginia has been summoned to appear in bankruptcy court in Kentucky, itself a considerable affront to the dignity owed the State as a sovereign, Virginia could just have easily been summoned to appear in bankruptcy court in California.

State sovereign immunity also serves the critical function of protecting the States' fiscal integrity. *See Alden*, 527 U.S. at 750-51; *Federal Maritime Comm'n*, 535 U.S. at 765; *Edelman v. Jordan*, 415 U.S. at 668-69. "Private suits against nonconsenting States—especially suits for money damages—may threaten the financial integrity of the States." *Alden*, 527 U.S. at 750. Protecting the States from suits over their war debts was a major concern of the framers.[3] As Chief Justice Marshall explained: "'[A]t the adoption of the [C]onstitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the federal Courts' prompted swift passage of the Eleventh Amendment."

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[3] *See* Alexander Hamilton, The Federalist No. 81, at 455 (I. Kramnick ed. 1987). Hamilton wrote that "there is no color to pretend that the State governments would, by adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith." *Id.*

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 406 (1821) (quoted in *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 40 n.9 (1994)).

This concern remains as important today as it was at the founding. "A general federal power to authorize private suits for money damages would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens." *Alden*, 527 U.S. at 750-51. "[T]he allocation of scarce resources among competing needs and interests lies at the heart of the political process." *Id.* at 751. A State cannot possibly provide full redress for every call on the State's resources, whether it be the "legitimate claim" of a judgment creditor or the demands of political constituencies. *Id.* As the Court concluded in *Alden*, "[i]f the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen." *Id.*

This reasoning is fully applicable to adversary proceedings brought in bankruptcy court to recover money judgments from a State. Indeed, such suits would pose a substantial threat to the fiscal integrity of the States given the large number and variety of contracts that States enter into in the course of administering government programs. *See, e.g.*, *Hoffman v. Connecticut Dep't of Income Maintenance*, 492 U.S. 96, 99 (1989) (dispute over Medicaid payments); *Arecibo Community Health Care, Inc. v. Puerto Rico*, 270 F.3d 17, 21 (1st Cir. 2001) (hospital administration contract); *In re Sacred Heart Hospital*, 133 F.3d 237, 239-40 (3d Cir. 1998) (dispute over medical assistance payments not timely submitted to State). But for the States' sovereign immunity, such suits would also be used to avoid and recover state tax payments. *See Hoffman*, 492 U.S. at 99; *In re Creative Goldsmiths*, 119 F.3d 1140, 1143 (4th Cir. 1997); *McVey Trucking, Inc. v. Illinois*, 812 F.2d 311, 313-14 (7th Cir. 1987); *see also Mitchell v. Franchise Tax Bd.*, 209 F.3d 1111, 1115 (9th Cir. 2000) (asserting claims of common law fraud and violations of the California Revenue and Tax Code). Given the large number of bankruptcy filings,[4] a holding that States are not immune from adversary proceedings which seek money damages would not only require a dramatic departure from constitutional doctrine, it would also expose the States to substantial and unpredictable liabilities.

B. An Adversary Proceeding Which Seeks Payment On Account Or To Avoid A Preferential Transfer Is An *In Personam* Action And Not An *In Rem* Proceeding

This case involves four separate adversary proceedings against arms of the State of Virginia which seek far different relief than that sought by the debtor in *Hood*. In *Hood*, the debtor filed an adversary proceeding against a state entity to obtain a determination that her student loans were dischargeable as an undue hardship. *See* 541 U.S. at 444-45. Hood did not "seek monetary damages or any affirmative relief." *Id.* at 450. Rather, she sought only "a determination of the dischargeability of her debt." *Id.* at 453.

In *Hood*, the Court reasoned that "the Bankruptcy Court's *in rem* jurisdiction allows it to adjudicate the debtor's discharge claim without *in personam* jurisdiction over the State." *Id.* (citing 4A C. Wright & A. Miller, *Federal Practice and Procedure* § 1070, pp. 280-81 (3d ed. 2002)). In rejecting the State's defense of Eleventh Amendment immunity, the Court expressly noted that "[t]he case before us is thus unlike an adversary proceeding by the bankruptcy

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[4] *See* Administrative Office of the U.S. Courts, *News Release: Bankruptcy Filings Fell in March 2005 12-Month Period* 1 (June 10, 2005) (reporting 1,590,975 bankruptcy filings in year ended March 31, 2005).

trustee seeking to recover property in the hands of the State on the grounds that the transfer was a voidable preference." *Id.* at 454.

By contrast, each of the adversary proceedings filed here were *in personam* actions which sought money damages from the State and are thus barred by the Eleventh Amendment. The complaints did not invoke *in rem* jurisdiction and did not seek to recover "particular dollars." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 38 (1992) (internal quotations and citation omitted).[5]

For example, the complaint filed against Central Virginia Community College seeks a payment on account in the amount of $4,898.00, plus interest, attorneys' fees and costs. *See* J.A. 5. The complaint further seeks from the State the amount of $63,387.00, on the ground that that sum is an avoidable preferential transfer. *See id.* at 6a-7a.

The complaint against the Virginia Military Institute seeks a payment on account in the amount of $ 30,409.00, plus interest, attorneys' fees and costs. *See id.* at 11a-12a. The VMI complaint also seeks to avoid and recover as preferential transfers amounts of $25,595.00 and $77,654.00. *See id.* at 13a -15a (Counts III & IV).[6]

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[5] Even when *in rem* jurisdiction is invoked, it is well established that the Eleventh Amendment prohibits a federal court from adjudicating a State's title to property when the State has possession of the property. *See California v. Deep Sea Research, Inc.*, 523 U.S. 491, 505-07 (1998); *In re New York*, 256 U.S. 503, 510-11 (1921). *See also Idaho v. Coeur d'Alene Tribe*, 521 U.S. at 289 (O'Connor, J., concurring).

[6] Likewise the adversary proceeding brought against Blue Ridge Community College included a "payment on account" claim of $35,317.60 (plus interest, attorneys' fees and costs) and to avoid and recover preferential transfers in the amount of $34,054.58 and $35,312.50. *See* J.A. 22a-25a. The adversary proceeding brought against New River Community College included a payment on account claim of $97,249.61 (plus interest, attorneys' fees and costs) and to avoid and recover preferential transfers in the amount of $65,264.00. *See id.* at 31a, 33a.

These adversary proceedings were thus clearly instituted for the purpose of recovering money judgments from state entities. Indeed, this case is nearly on all fours with *Nordic Village*, where the Court held that sovereign immunity barred an adversary proceeding brought against the United States to recover money paid to the Internal Revenue Service. Analyzing a claim similar to those brought here, the Court explained that the bankruptcy trustee:

> did not invoke, and the Bankruptcy Court did not purport to exercise, *in rem* jurisdiction. Respondent sought to recover a sum of money, not "particular dollars," so there was no *res* to which the court's *in rem* jurisdiction could have attached. In any event, we have never applied an *in rem* exception to the sovereign-immunity bar against monetary recovery, and have suggested that no such exception exists.

503 U.S. at 38-39 (quoting *Begier v. IRS*, 496 U.S. 53, 62 (1990), and citing *United States v. Shaw*, 309 U.S. 495, 502-03 (1940) (other citation omitted)).

To allow a federal bankrupcty court to adjudicate the adversary proceedings at issue here would violate the Eleventh Amendment's critical function of protecting the fiscal integrity of the States. *See Alden*, 527 U.S. at 750-51; *Federal Maritime Comm'n*, 535 U.S. at 765; *Edelman*, 415 U.S. at 668-69. Indeed, it would be an especially untoward result to allow these claims as their purpose is merely to increase the size of the bankruptcy estate and redistribute money from the State to the various creditors of Wallace's Bookstores and not to creditors of the State itself.

The Eleventh Amendment was adopted to protect the States from suits over their own war debts—a situation involving an exceedingly strong claim "on the conscience of the sovereign." *Hans v. Louisiana*, 134 U.S. 1, 13 (1890)

(quoting Hamilton, The Federalist No. 81). It is thus unsupportable to contend that the States should be subject to suits to recover sums of money to be used to enhance the recoveries of persons and entities that are not even creditors of the State.

II. CONGRESS DOES NOT HAVE POWER UNDER THE BANKRUPTCY CLAUSE OF ARTICLE I TO ABROGATE A STATE'S ELEVENTH AMENDMENT IMMUNITY

The Court has repeatedly held that "[e]ven when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72 (1996) (Indian Commerce Clause). *See also Florida Prepaid Postsecond. Ed. Exp. Bd. v. College Savings Bank*, 527 U.S. 627, 636 (1999) (same) (Patent Remedy Act). The Court has also explained that "[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Seminole Tribe*, 517 U.S. at 72-73.

Federal bankruptcy courts are Article I courts. The Court has held, however, that "it would be quite strange to prohibit Congress from exercising its Article I powers to abrogate state sovereign immunity in Article III judicial proceedings, but permit the use of those same Article I powers to create court-like administrative tribunals where sovereign immunity does not apply." *Federal Maritime Comm'n*, 535 U.S. at 761 (citing *Seminole Tribe*, 517 U.S. at 72). *See also Alden*, 527 U.S. at 754 ("[T]he States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation."). So, too, a private party suit against a State brought in an Article I court

is just as offensive to the principle of state sovereign immunity as a suit brought in an Article II tribunal such as the Federal Maritime Commission.

It is a truism that "[t]he States have consented . . . to some suits pursuant to the plan of the Convention or to subsequent constitutional Amendments."[7] *Id.* at 755. The Court has recognized, however, that "in ratifying the Constitution," the States surrendered their immunity from suit in only the limited circumstances of "suits brought by other States or by the Federal Government." *Id.*

The court of appeals acknowledged "*Seminole Tribe*'s broad language barring Congress from abrogating state sovereign immunity pursuant to its Article I powers." *Hood*, 319 F.3d at 761. The court nonetheless held it not controlling, reasoning that "neither *Seminole Tribe* nor any of the Supreme Court's other recent sovereign immunity cases address Congress's Bankruptcy Clause powers as understood in the plan of the Convention." *Id.* at 761-62. *But see Seminole Tribe*, 517 U.S. at 72 n.16 ("[I]t has not been widely thought that the federal . . . bankruptcy . . . statutes abrogated the States' sovereign immunity."). Instead, the court of appeals concluded that "the text of the Constitution and other evidence of the Framers' intent demonstrate that under the Bankruptcy Clause of Article I, section 8, Congress has the power to abrogate state sovereign immunity." 319 F.3d at 762.

In so holding, the court of appeals heavily relied on Article I's grant to Congress of "the power to make 'uniform' laws." *Id.* at 763. The court also relied on what it believed to be the framers' understanding that the bankruptcy power was exclusive in the Federal Government, and its inference that a

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[7] By adopting the Fourteenth Amendment, the States surrendered their immunity from suits by private parties brought under legislation enacted to enforce the protections of that Amendment. *See Alden*, 527 U.S. at 756 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)).

passage in *The Federalist* suggests "that the states shed their immunity from suit along with their power to legislate together when the states agreed to the Bankruptcy Clause's uniformity provision." *Id.* at 765.

Most remarkably, the court of appeals acknowledged that "[m]uch of the evidence regarding the plan of the Convention is ambiguous." *Id.* at 767. It nonetheless concluded that "the Constitution's text and Hamilton's reference in The Federalist No. 81 to the means of abrogating sovereignty in The Federalist No. 32 *suggests that*, with the Bankruptcy Clause, the states granted Congress the power to abrogate state sovereign immunity." *Id.* (emphasis added).

Contrary to the view of the Sixth Circuit, these "suggestions" fall far short of the "compelling evidence" required by this Court to find "a surrender inherent in the constitutional compact." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 781 (1991); *see also Alden*, 527 U.S. at 741 (no abrogation "in the constitutional compact" absent "'compelling evidence'") (quoting *Blatchford*, 501 U.S. at 781). At most, they establish that the States surrendered their legislative power over the subject of bankruptcy, a conclusion which itself is dispelled by the history of federal bankruptcy law. *See* Tabb, *The Law of Bankruptcy* § 1.6, at 33.

Indeed, history, practice, and precedent—all of which were ignored by the Sixth Circuit—refute its holding. As one authority concludes, "[p]urely deductive logical arguments . . . relying upon certain oblique cross-references in the Federalist Papers, that the states *necessarily* surrendered their sovereign immunity with respect to federal bankruptcy proceedings in ratifying the Constitution, are contradicted by the historical context in which the Framers crafted that document." Ralph Brubaker, *Of State Sovereign Immunity and Prospective Remedies: The Bankruptcy Discharge as Statutory* Ex Parte Young *Relief*, 76 Am. Bankr. L.J. 461, 481-82 (2002) (footnote omitted).

As a leading authority explains, "[t]he subject of bankruptcy received only passing attention from the framers at the Constitutional Convention of 1787." Tabb, *The Law of Bankruptcy* § 1.6, at 32. "The Founding Fathers included the provision almost as an afterthought. Charles Pinckney . . . proposed the Bankruptcy Clause late in the constitutional convention of 1787, and it was approved with little debate." David A. Skeel, Jr., *Debt's Dominion: A History of Bankruptcy Law In America* 23 (2001).

Another commentator observes that Pinckney proposed the clause as an amendment to the Full Faith and Credit Clause. Frank R. Kennedy, *Bankruptcy and the Constitution*, 33 U. Mich. L. Quad. Notes 40, 40 (Spring 1989). Pinckney's proposal followed "a discussion on the Convention floor of the question whether a state insolvency act should be treated like a state court judgment. At least one delegate to the Convention had represented clients in litigation presenting the question whether a discharge granted in one state was binding on the courts of another state." *Id.* While the clause was eventually removed from the Full Faith and Credit Clause and placed immediately following the commerce clause in Article I, section 8, it "was adopted with 'practically no debate.'" *Id.*

Significantly, only one delegate (Roger Sherman of Connecticut) voted against the clause's adoption. The basis of Sherman's objection was that the clause "would permit the punishment of bankruptcy by death as under the early laws of England." *Id.* In response, Gouverneur Morris of Pennsylvania "acknowledged that bankruptcy was 'an extensive and delicate subject,' but . . . 'saw no danger of abuse by the legislature of the United States.'" *Id.*

This is hardly the type of debate that would have ensued if the framers had intended that the States grant Congress the power to abrogate their sovereign immunity under the clause. Indeed, had that been the framers' understanding, there un-

doubtedly would have been a vigorous and extensive debate on the matter.

Thus, the Bankruptcy Clause's reference to "uniform laws" in its grant of power reflects the view of the framers that "[a] federal bankruptcy law was apparently believed . . . necessary because of the problems for commerce and for nonresident creditors stemming from varying and discriminatory state laws." Tabb, *The Law of Bankruptcy* § 1.6, at 32. *See also id.* § 1.9, at 44 ("Nonresident creditors might be discriminated against by local state laws, and also might have difficulty in reaching property of the debtor located in or removed to another state."). Thus, for the same reason that the States granted legislative authority to the Federal Government over interstate commerce, the States granted Congress power over bankruptcy. As Madison explained:

> The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question.

The Federalist No. 42, at 278 (Isaac Kramnick ed., 1987).

At most then, the clause represents a grant by the States to the Federal Government of legislative authority over the subject of bankruptcy.[8] This grant, however, falls far short of the compelling evidence required to establish that the States surrendered their immunity from suits by private parties as part

[8] This view is consistent with the continuation of state authority over bankruptcy for much of the nineteenth century as well as the continuing role that state law plays in bankruptcy. *See* Tabb, *The Law of Bankruptcy* § 1.6, at 32-33 ("A federal bankruptcy law was in existence only from 1800 to 1803, from 1841 to 1843, and from 1867 to 1878. . . . The states picked up the slack and continued to regulate debtor-creditor relations and bankruptcy and insolvency during this lengthy era of federal inaction.").

of the plan of the convention. Indeed, the Court has never held that the framers' grant to the federal government of authority over certain substantive areas because of the need for uniform rules is sufficient to establish that the States surrendered their immunity from private party suits in that area.

For example, the Constitution grants the federal courts jurisdiction over admiralty and maritime cases because of the need for uniform rules in the area. The Court, however, has rejected the contention that "[t]he constitutional necessity of uniformity in the regulation of maritime commerce limits the States' sovereignty with respect to the Federal Government's authority to regulate that commerce," and subjects unconsenting States to private party suits for damages. *Federal Maritime Comm'n*, 535 U.S. at 767 (internal quotations and citation omitted). *See also Ex parte New York*, 256 U.S. 490, 502-03 (1921) ("It is not inconsistent [with need for uniformity of maritime law] to accord to the states, which enjoy the prerogatives of sovereignty to the extent of being exempt from litigation at the suit of individuals in all other judicial tribunals, a like exemption in the courts of admiralty and maritime jurisdiction.").

So, too, the Indian Commerce Clause grants Congress "plenary power to legislate in the field of Indian affairs." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). But as the Court explained in *Seminole Tribe*, "the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is in an area . . . that is under the exclusive control of the Federal Government." 517 U.S. at 72. Accordingly, "'[e]ven when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.'" *Id.*

Nor does the Bankruptcy Clause's text, granting to Congress the power "[t]o establish . . . uniform [l]aws on the subject of Bankruptcies," U.S. Const. Art. I, § 8, cl. 4, provide probative, let alone compelling, evidence that the States surrendered their sovereign immunity with respect to bankruptcy proceedings. Quite the opposite, the Court has recognized that the uniformity requirement is a limitation on Congress' power under the clause. As the Court has explained:

> Unlike the Commerce Clause, the Bankruptcy Clause itself contains an affirmative limitation or restriction upon Congress' power: bankruptcy laws must be uniform throughout the United States. Such uniformity in the applicability of legislation is not required by the Commerce Clause. Thus, if we were to hold that Congress had the power to enact nonuniform bankruptcy laws pursuant to the Commerce Clause, we would eradicate from the Constitution *a limitation on the power of Congress to enact bankruptcy laws.*

Railway Labor Executives Ass'n v. Gibbons, 455 U.S. 457, 468-69 (1982) (emphasis added). It would be strange to read language that imposes limits on congressional power, as also manifesting a surrender by the States of their sovereign immunity. The Sixth Circuit, however, did not even acknowledge *Gibbons*. *See* 319 F.3d at 763-64 (discussing uniformity requirement).

Nor can the contention that the Bankruptcy Clause's "uniformity" requirement manifests a surrender of sovereign immunity be squared with the Court's longstanding interpretation of its meaning. As the Court long ago explained, "[t]he laws passed on the subject must . . . be uniform throughout the United States, but that uniformity is geographical and not personal." *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 188 (1902); *see also Stellwagen v. Clum*, 245 U.S. 605, 613 (1918).

Thus, in *Moyses* the Court upheld the application of state exemption laws, which shield certain assets from creditors, in bankruptcy proceedings. In so holding, the Court stated that "[i]t was many times ruled that this provision was not in derogation of the limitation of uniformity because all contracts were made with reference to existing laws, and no creditor could recover more from his debtor than the unexempted part of his assets." 186 U.S. at 189. The Court further explained that:

> the system is, in the constitutional sense, uniform throughout the United States, when the trustee takes in each State whatever would have been available to the creditors if the bankrupt law had not been passed. The general operation of the law is uniform although it may result in certain particulars differently in different States.

Id. at 190.[9]

So, too, the existence of Eleventh Amendment immunity does not render the bankruptcy scheme non-uniform as the concept of uniformity has been interpreted by this Court. Rather, those persons and entities that contract with a State are presumably aware whether the State has waived its Eleventh Amendment immunity with respect to any dispute arising under the contract. Recognizing the continued applicability of Eleventh Amendment immunity simply results in "the trustee tak[ing] in each State whatever would have been available to the creditors if the bankrupt law had not been passed." *Id.* "Holding that federal courts do not have jurisdiction over the states without their consent does not

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[9] "[M]ost laws governing the substance of the debtor-creditor relationship are *state* laws," and it is commonplace in bankruptcy "that debtors and creditors in different states may be treated differently on similar facts." Tabb, *The Law of Bankruptcy* § 1.9, at 46. As Tabb explains, "a debtor in California might be liable in bankruptcy on a claim for breach of a cohabitation agreement, while a Vermont debtor might not be liable on such a claim on identical facts." *Id.*

frustrate this requirement of geographic uniformity since sovereign immunity applies uniformly to all states and to all parties in a bankruptcy proceeding." *In re Fernandez*, 123 F.3d 241, 244 (5th Cir.), *amended by* 130 F.3d 1138, 1139 (5th Cir. 1997).

Notwithstanding this reality, in *Hood* the Sixth Circuit rejected the argument that "[t]he 'uniformity' provision is . . . '"a requirement of geographic uniformity" and nothing more.'" 319 F.3d at 763 (quoting *Fernandez*, 123 F.3d at 244 (quoting *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 172 (1946) (Frankfurter, J., concurring)). According to the court of appeals, the "language from Justice Frankfurter's concurring opinion in *Vanston* was inconsistent with the majority opinion in that case," which the Sixth Circuit read as holding that the "the asserted claim was inconsistent with federal bankruptcy policies and thus could not be asserted—regardless of its status under state law." *Id.* The court of appeals thus concluded that "[o]n the [*Vanston*] majority's reasoning, federal courts must do more than treat state laws uniformly; federal courts must enforce federal bankruptcy law. If *Vanston* is any guide as to what uniformity requires, then uniformity requires much more than Justice Frankfurter's concurrence suggests." *Id.* at 763-64.

That "federal courts must enforce federal bankruptcy law" says at most that federal law preempts conflicting state law. It says nothing about whether Congress has power under Article I to override the States' constitutionally protected immunity from suits for money damages. Indeed, the court of appeals simply ignored this Court's decision in *Moyses* as well as other cases which hold that "all that the Constitution requires is 'geographical' uniformity, rather than personal uniformity." Tabb, *The Law of Bankruptcy* § 1.9, at 47. *See Stellwagen*, 245 U.S. at 613. And the court of appeals also ignored this Court's holding in *Gibbons* that the "uniformity" language is "a limitation on the power of Congress to enact bankruptcy laws." 455 U.S. at 469.

The text of the Bankruptcy Clause thus provides no support for the notion that it was intended to be a surrender by the States of their sovereign immunity with respect to adversary proceedings. Indeed, it would be highly anomalous to recognize that the Bankruptcy Clause, with its textual limitation on Congressional power, in reality grants Congress broader power than it has under the Commerce Clause. *See Seminole Tribe*, 517 U.S. at 72-73 n.16.

The Sixth Circuit in *Hood* also found it persuasive that during the state ratification debates "none of the debaters objected to subjecting the states to federal suits in bankruptcy." 319 F.3d at 767. This absence of opposition, the Sixth Circuit reasoned, "*could* . . . reflect the ratifiers' acceptance that because a federal bankruptcy system could cure the previous systems' ills only if it applied uniformly to all creditors and debtors, the Bankruptcy Clause must grant Congress the power to abrogate the states' sovereign immunity." *Id.* (emphasis added).

The court's reasoning ignores the most realistic possibility—that adversary proceedings against a State to void and recover preferential transfers were never contemplated by the members of the founding generation. *See* discussion *supra* at 17 (absence of debate on Bankruptcy Clause). Indeed, it was not until 1978, nearly 200 years after the ratification of the Constitution and 140 years after federal bankruptcy law first recognized the voidable preferential transfer, that Congress even attempted to subject the States to suits for money damages under the bankruptcy clause. *See Hoffman v. Connecticut Dept. of Income Maintenance*, 492 U.S. at

100-04 (plurality op.); *see also id.* at 111-13 (Stevens, J. dissenting).[10]

This longstanding view of its own powers is compelling evidence that Congress lacks authority to abrogate the States' sovereign immunity under the bankruptcy clause.[11] *See Printz v. United States*, 521 U.S. 898, 905 (1997) (If "earlier Congresses avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist."); *see also id.* at 918 (rejecting recent statutes as evidence of congressional power to require state and local executive officials to administer a federal regulatory program; "Their persuasive force is far outweighed by almost two centuries of apparent congressional avoidance of the practice."). As the Court explained in *Seminole Tribe*, "it has not been widely thought that the federal . . . bankruptcy . . . . statutes abrogated the States' sovereign immunity. . . .

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[10] That attempt was, of course, ineffective. *See Hoffman*, 492 U.S. at 104 (plurality op.); *id.* at 105 (O'Connor, J., concurring). It was not until the Bankruptcy Reform Act of 1994 that Congress clearly expressed its intent to abrogate the States' Eleventh Amendment immunity. *See* Pub. L. No. 103-394, title I, § 113, 108 Stat. 4106, 4117 (1994) (codified at 11 U.S.C. § 106).

[11] While the first federal bankruptcy statute (Act of April 4, 1800, ch. 19, § 62, 2 Stat. 19-21) allowed for avoidance of fraudulent conveyances, "the act said nothing about preferential transfers." Vern Countryman, *The Concept of a Voidable Preference in Bankruptcy*, 38 Vand. L. Rev. 713, 719 (1985).

The concept of a voidable preferential transfer first appeared in the "short-lived Bankruptcy Act of 1841." *See id.* (discussing 5 Stat. 440, § 2 (1841)). It has been a part of all subsequent federal bankruptcy statutes. *See id.* at 719-35; *see also Toof v. Martin*, 80 U.S. (13 Wall.) 40, 46 (1871) (discussing 14 Stat. 517, § 35 (1867) ("That clause was intended to defeat preferences to a creditor, made by a debtor when insolvent or in contemplation of insolvency. . . . [The clause] authorizes in such case the assignee to recover the property or its value from the party who receives it.")). Yet Congress did not subject the States to adversary proceedings to avoid and recover preferential transfers until the late twentieth century.

Although the . . . bankruptcy laws have existed practically since our Nation's inception, . . . there is no established tradition in the lower federal courts of allowing enforcement of those federal statutes against the States." 517 U.S. 72-73 & n.16.

Thus, none of the crucial evidence—the Bankruptcy Clause's text, the framers' understanding of its meaning, this Court's interpretation of the clause, or the ratification debates—supports the court of appeals' holding that the States surrendered their immunity from suits for damages in bankruptcy. There is therefore no basis for treating Congress' attempt to abrogate the States' sovereign immunity in bankruptcy differently from other Article I abrogation legislation which the Court has invalidated as beyond Congress' power.

CONCLUSION

The judgment of the court of appeals should be reversed.

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